Central Law Journal.

ESTABLISHED JANUARY, 1874.

VOL. 35 ST. LOUIS, M[illegible]ER 4, 1892. No. 19

Central Law Journal.

A LEGAL WEEKLY NEWSPAPER.
Published by

Central Law Journal Company,

919 OLIVE ST., ST. LOUIS, MO.

To whom all communication should be addressed.
Subscription price, FIVE DOLLARS per annum, in advance. Single numbers, TWENTY-FIVE CENTS.

Entered at the post-office, St. Louis, Mo., as second-class matter.

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Central Law Journal.

ST. LOUIS, MO., NOVEMBER 4, 1892.

A correspondent, in another column, calls attention to what he regards as an error in a recent editorial (35 Cent. L. J. 201), on the subject of "Regulation of Railroad Rates by the States." He thinks our statement that the decision of the Minnesota Milk Case, denying power to the State to fix rates absolutely and without judicial inquiry, was "eminently sound," is contradicted by a subsequent assertion that the later decisions of the courts have settled the proposition that a State has absolute power to fix and prescribe rates and charges. If our esteemed critic had given careful attention to our language he would have seen that the mistake was his and not ours. We said that in the Minnesota case it was held that the State had not the power, *acting through commissioners*, to fix rates absolutely and finally without judicial inquiry. The words italicized are omitted by our correspondent, but in them is the essence of the decision. This is in entire harmony with the other statement that the later decisions of the courts seem to have settled the proposition that a State has absolute power, through its legislature, to fix rates, the reasonableness of which is not subject to judicial inquiry. In other words, the court has proceeded upon the principle that the legislature may do what a board of commissioners appointed by it cannot do, a distinction which we have frequently asserted is of exceeding fineness. And though, as our correspondent shows, the language of Judge McCormick's decision would seem to go to the length of limiting even the power of the legislature in the matter, it must be remembered that in the case at hand, he was passing upon the acts of railroad commissioners simply, and the question as to the power of the legislature itself was not in issue.

A decision of considerable importance was lately rendered by the United States Circuit Court of Appeals, at St. Paul, Justice Brewer delivering the opinion. The case was one in which an Iowa shipper sued for the recovery of alleged overcharges on corn shipped to Chicago. He began shipping east to Chicago, but finding that the through rate to New York was cheaper, he subsequently shipped through and sued for the difference in rates. He recovered a judgment, which has been reversed by the circuit court of appeals. Justice Brewer, in rendering the decision, holds that where two companies owning connecting lines of roads unite in a joint through tariff, they form for the connecting roads practically a new and independent line; that neither company is bound to adjust its own local rates to suit the other, nor compelled to use a joint tariff with it, but that it may insist upon charging its local rates for all transportation over its lines, and that if the companies make a joint tariff it is not a basis by which the reasonableness of the local tariff of either line is determined. "In the 'long and short haul' provision of the law," Justice Brewer says, "the use of the word 'line' is significant. Two carriers may use the same road, but each has its separate line. The defendant may lease trackage rights of any other railroad company, but the joint use of the same track does not create the same line, so as to compel either company to graduate its tariff by that of the other. In this act joint tariffs are recognized, and if congress had intended to make the local tariff subordinate to or measured by the joint tariff, its language would have been clear and explicit."

The report of the fifteenth annual meeting of the Alabama State Bar Association in July, which has just reached us, shows that that organization continues to be prosperous and grows in members and interest each year. A bill proposed by the committee on legislation, which had for its object to define the matrimonial domicile of husband and wife, in respect to suits for divorce, and to limit divorces to cases in favor of persons having a matrimonial domicile, and to cases against persons having an actual domicile where the divorce is granted, caused considerable discussion, particularly as to its constitutional feature. Proposed bills to define the rights of a widow in the estate of her deceased husband, and to fix the rules of descent in the State as to persons dying in the State, who leave no husband or widow or children or

their descendants, were discussed. Addresses were delivered by A. B. McEachin, the President of the Association, reviewing recent legislation, and by John A. Foster, on "Politics on the Bench." The report of the committee on legislation was quite lengthy, embracing much proposed legislation. A. C. Hargrove was elected president, and Alex. Troy secretary and treasurer for the ensuing year.

NOTES OF RECENT DECISIONS.

NATIONAL BANKS—INSOLVENCY—DEPOSITORS—RIGHT OF SET-OFF.—In Yardley v. Clothier, the United States Circuit Court of Appeals for the Third Circuit, hold that the indorser of a note which is discounted by a national bank, and which matures after the bank becomes insolvent and a receiver is appointed, is entitled to set off against the note the amount of his deposits in the bank at the time of the failure. The opinion by Wales, J., reviews many of the conflicting authorities upon the question as follows:

The rule of set-off is well understood to be that in all cases of mutual credit only the balance that shall appear to be due upon an adjudication of the mutual accounts should be paid, and it is that balance only which is the debt and is recoverable; that mutual obligations for the payment of money cancel each other; and that the death or insolvency of either party will make no difference in the adjustment of their mutual accounts. This rule may be modified by exceptional circumstances, or by statute, but is generally applied as here stated. The allowance of set-off has been frequently objected to in the distribution of insolvents' assets and in the settlement of decedents' estates for the reason that it would create preferences among creditors, but the controlling weight of authority has established the doctrine that, in the absence of express statutory prohibition, a set-off of a debt owing to the defendant will be allowed if it was due when the creditor's rights attached, whether the debt sued on was due at the same time or matured subsequently. In Skiles v. Houston, 110 Pa. St. 254, 2 Atl. Rep. 30, the defendant was sued by Skiles, as the administrator of Henderson, on a promissory note which Henderson had discounted for the defendant before his death, and which matured subsequently. Henderson had been a banker, at whose banking house the defendant kept a running account, and had on deposit there at the time of Henderson's death an amount nearly equal to that of the note, against which he claimed to set off the deposit *pro tanto*. Henderson's estate at his death was utterly insolvent. The objection was made that to allow the set-off would be, in effect, to prefer a creditor, and interfere with the due administration of the estate; but the court said: "When the plaintiff's intestate's died he was already indebted by a complete and perfect obligation to the defendant Houston. Suit could have been brought immediately by Houston, and recovery had for the whole amount, notwithstanding the note held by Henderson against Houston, because the latter was not yet due. It is evident, then, that when upon Henderson's death the note against Houston passed to his administrator, it did so clogged with the whole of Henderson's debt to Houston, for the very reason that it was a perfected debt at the time of Henderson's death. Nor, in such case, is Henderson's insolvency at all material." In Bosler's Adm'r v. Bank, 4 Pa. St. 32, in which the facts were the reverse of those in Skiles v. Houston, the court decided that the set-off was not allowable for the simple reason that it would disturb the course of administration, because the debt owing to the bank by Bosler did not mature until after the death of the intestate, who had died insolvent, while the debt of the bank to Bosler was due at the time of the latter's death, and in the meantime the right of creditors of his estate had intervened. The decision in this last case has been commented on and explained by the same court on several occasions. In Light v. Leininger, 8 Pa. St. 403, it was held that a debter may set off a debt due him by his creditor at the time of the latter's death, though the estate of the creditor be insolvent, and the court there said: "The case of Bosler Adm'r v. Bank, upon which the plaintiff hung his hopes, is not in point. The decision in that case went on the ground that the character of the claims was fixed at the time of the decedent's death; and, as the note of the defendant in that case was not due, his representative was entitled to demand and receive from the bank the amount of the deposit of the deceased as assets." In Jordan v. Sharlock, 84 Pa. St. 366, the court said: "When Bosler died, the bank had no debt for which it could sue, while Bosler's right of action was perfect before his death. But at the moment of his death the law took possession of his estate for the benefit of his creditors, he being insolvent. It was not the case of a mere voluntary transfer, but new rights sprung into being on the instant of his death."

In Skiles v. Houston, *supra*, the court makes the following comment: "In the present case the defendant's right of set-off already existed at the time of the plaintiff's [intestate's] death. But if it already existed it would be an anomaly that it is taken away by the non-maturity, at that same time, of the decedent's claim against him. Plaintiff's counsel admit, and it is undoubtedly true, that if, the intestate's claim against the defendant was mature at the intestate's death, the right of set-off was complete. Why was it not equally complete in case of the immaturity of the intestate's claim? Certainly not because of anything decided in Bosler's Adm'r v. Bank, because that decision denied the right only because it did not exist at the death of the intestate, and, as other rights intervened at the moment of the death, they could not be impaired by a right which only came into existence subsequently. Here the right of set-off existed prior to the death of the intestate, and therefore prior to the rights of the other creditors to equal distribution. The distinction is very plain, and does not require further elaboration." In *Re* Middle Dist. Bank, 1 Paige, 584, the chancellor decided that any equitable offset which the debter had at the time the bank stopped payment was not altered by the appointment of a receiver, and that it made no difference whether the debt of the bank was then payable or had become due since; and also that if the real debtor was unable to pay, and the receiver was compelled to resort to the indorser, who was eventually to be the loser, he had the same equitable right to set off bills which he had at the time the bank stopped

payment. To the like effect is Van Waggoner v. Gaslight Co., 23 N. J. Law, 283, where it was held that "the assignees take a bankrupt's property in the same condition, and subject to the same burthens, as the bankrupt himself held it." In that case the chief justice said: "I am of the opinion, both upon principal and authority, that the debtor of an insolvent corporation loses none of his rights by the act of insolvency; that he has the same equitable right of set-off against the receivers that he had against the corporation at the time of its insolvency; and consequently, that a debtor of the bank, whether his indebtedness has actually occurred or not at the time of the insolvency, may in equity set off against his debt either a deposit in the bank or bills of the bank, *bona fide* received by him before the failure of the bank." In Hade v. McVay, 31 Ohio St. 231, which was an action by the receiver of an insolvent national bank against the defendants as drawers and acceptors, respectively, of a bill of exchange, the same general principle was recognized to this extent: That "the receiver holds to the bank and its creditors the relation, substantially, of a statutory assignee. A right of set-off, perfect and available against the bank at the time of his appointment as receiver, is not affected by the bank's insolvency. He succeeds only to the rights of the bank at the time it goes into liquidation." See, also Clarke v. Hawkins, 5 R. I. 224. Most precisely in point is Balbach v. Frelinghuysen, 15 Fed. Rep. 685, where Judge Nixon says: "I have much less difficulty with regard to the other question raised by the pleading and the evidence, to-wit, the right of the complainants to off-set the amount of their credits on the books of the bank at the time of the failure against the two promissory notes for $1,500 each, which the bank had received from them for discount in the months of July and August preceding the failure. It is unquestionably true that if the Newark National Bank held these notes at the time of the failure, and was entitled to receive the amounts due thereon when they matured, such off-set might be made." In Snyder's Sons Co. v. Armstrong, 37 Fed. Rep. 18, Judge Hammond pertinently remarks, referring to section 5242: "I should not hold our act of congress to have abrogated so important a principle of the administration of insolvent estates as the right of set-off, except upon the most explicit declaration to that effect, or the most imperative implication arising out of the necessities of construction. · · · The receiver is, in my judgment, under the act of congress, only an insolvency assignee, representing in his relation to the depositors, on the subject of set-off, the bank itself. · · · And it seems to me plain that that section is no more in the way of allowing a set-off where the note passed into the hands of the receiver before maturity than where it passed to him after it became due." These authorities fully sustain the defendant's plea of set-off, but the plaintiff's counsel has cited a few decisions which require notice. In Armstrong v. Scott, 36 Fed. Rep. 63, the court decided that: "The unmistakable force and meaning of the law is to place all unsecured creditors upon the same footing of equality. When the plaintiff was appointed receiver, the defendant was in the list of unsecured depositors, to whom payment—the bank being insolvent—was prohibited. The defendant had then no right of set-off, nor any equity against its note, not then matured, which passed to the receiver. To allow the set-off, now that the note has matured, and thereby make payment in full to the defendant in part discharge of its obligation to the bank, would be contrary not only to the policy of the law, but also the plain meaning of its provisions." So far as this question has been passed upon by the federal courts, the decision in Armstrong v. Scott stands alone, and it derives no support from the cases referred to in the opinion of the court by which it was rendered. Thus in Hade v. McVay, *supra*, as already noticed, it was held that a right of set-off, perfect and available against the bank at the time of the appointment of a receiver, was not impaired by the bank's insolvency. In Bank v. Taylor, 56 Pa. St. 14, the court refused to allow the set-off of a claim against the bank, which had been acquired by the defendant after the bank's insolvency. Bung Manuf'g Co. v. Armstrong, 34 Fed. Rep. 94, has no relevancy to the present question. Stephen v. Schuchmann, 32 Mo. App. 333, adopts the identical language of Armstrong v. Scott, and refers to some additional authorities, which, on examination, are found to be decided on a different state of facts. In Bank v. Price, 22 Fed. Rep. 697, the bank had made a payment to a creditor after its insolvency, and under circumstances which made the payment a violation of the terms of the statute, as being a transfer of assets with intent to prefer. The intent to prefer was a just inference from the act of the bank officials. In *Re* Commercial Bank Corp., L. R. 1 Ch App. 538, there was an appeal by the official liquidator of the bank from the decree of the master of the rolls, who had made an order restraining him from negotiating certain bills of exchange. The bank was indebted to the complainants, who sought to prevent the negotiation of the bills, which had been accepted by them in order that they might set off against them on maturity a debt due from the bank. Lord Justice Turner, in reversing the judgment below, said: "There is not, as I apprehend, any right on the part of the complainants, either at law or equity, to set off against their future liability upon the bill accepted by them the present liability of the bank to them upon the bank's dishonored acceptances nor was there any ground upon which the complainants are entitled to insist upon their acceptances being retained and held by the bank until they became due, in order that the set-off which would then arise may be made available to them."

This would seem to favor the present defense, for here the notes indorsed by Clothier had matured in the hands of the receiver, and the deposit of the defendant thus became a valid set-off. The notes could have been indorsed away for value, as had been done in Balbach v. Frelinghuysen, *supra;* but as this was not done by the bank or its receiver, the defendant was entitled to his set-off. The statute was designed to prevent fraudulent transfers of assets and payments of money made by the bank with a view to prevent the application of the assets in the manner prescribed, or with a view to the preference of one creditor to another; but the allowance of the set-off of the defendant's deposit would not be a violation of the statute under any fair and reasonable construction of its provisions. The application of the rule that mutual accounts are to be adjusted in such manner that only the balance constitutes the debt to be recovered is, as has been seen, established by a long line of judicial precedents, and if not forbidden by the language or the meaning of the national banking act.

COVENANTS—RESTRICTING USE OF LAND—ENFORCEMENT BY SUBSEQUENT PURCHASERS.—The case of Mulligan v. Jordan, 24 Atl. Rep. 54, decided by the Court of Chancery of New

Jersey, is in line with De Gray v. Monmouth Beach Club House Company, recently reported in 35 Cent. L. J. 184. In the Monmouth Beach case the court held that where lots were sold with restrictions in pursuance of a general plan for the improvement of the property, the purchaser of one lot could maintain a bill in equity to restrain the violation of the covenant by a subsequent purchaser of another lot, even though there had been no covenant to insert the same restrictions in all the deeds. In the Jordan case the vice-chancellor declined to assist one purchaser to enforce a covenant against a subsequent purchaser of an adjacent lot, although both had purchased of the same grantor, subject to the same covenant. He said:

"The complainant's deed is prior to that of the defendant. There is no covenant to the complainant from Mr. Roberts, the grantor, that he holds the remainder of the property subject to the same restrictions, or that he will exact similar covenants from purchasers of the remaining property; nor is the complainant the express assign of defendant's covenant with Mr. Roberts; nor is there any covenant between the complainant and the defendant. The right of an owner of a lot to enforce a covenant (to which he is not a party or an assign) restrictive of the use of other hands is dependent on the covenant having been made for the benefit of this lot. Obviously, while a subsequent purchaser might, by the operation of this rule, acquire a right of action against a prior purchaser, the prior purchaser would acquire no rights from a covenant entered into by a subsequent purchaser, unless there exists some condition which will entitle him to the benefit of such covenant. The right of grantees from the common grantor to enforce, *inter sese*, covenants entered into by each with said grantor, is confined to cases where there has been proof of a general plan or scheme for the improvement of the property, and its consequent benefit, and the covenant has been entered into as part of a general plan to be exacted from all purchasers, and to be for the benefit of each purchaser, and the party has bought with reference to such general plan or scheme, and the covenant has entered into the consideration of his purchase." Similar covenants had been inserted in every deed made by the grantor, but the Vice-Chancellor said that this had been held not to be sufficient evidence that the covenant had been entered into for the benefit of other lands conveyed by the grantor. Jewell v. Lee, 14 Allen, 145; Sharp v. Ropes, 110 Mass. 381; Keates v. Lyon, 4 Ch. App. 218; Renals v. Cowlishaw, 11 Ch. Div. 866, and other cases cited in De Gray v. Club House Co.

BONDS—CHANGE IN OBLIGATION—RELEASE OF SURETY—DEATH.—In Shackamaxon Bank v. Yard, the Supreme Court of Pennsylvania hold that the fact that a person who has been elected cashier of a bank, and who has given bond for the faithful performance of his duties as such, afterwards undertakes for an added compensation to keep the book known as the "individual ledger," does not affect such a change in his duties as to discharge the surety in case of embezzlement. Williams, J., says:

The sureties admit that their principal has broken the condition of the bond, and that their liability would be fixed if the circumstances on which they rely to show their discharge from such liability did not exist. The contention is that the fact that Huggard performed other services for the bank than those involved in or belonging to the office of cashier is, *per se*, a discharge of the sureties from their undertaking for his faithful performance of his official duties. This position is thought to find support in the recent case of Telegraph Co. v. Lennig, 139 Penn. St. 594, 21 Atl. Rep. 162. In that case one had been employed as a book-keeper, and had given a bond, with sureties, to secure his employers against loss by his want of fidelity in the performance of his work. Afterwards he was made cashier *pro tempore*, and a few days later he was appointed to that office. While acting under the *pro tempore* appointment, he embezzled money belonging to his employers. To conceal the crime so committed, he made false entries in the books. An action was brought upon the bond given on his appointment as book-keeper to recover for his embezzlement as cashier *pro tem.* The sureties defended on the ground that the money sought to be recovered from them was lost by reason of the embezzlement of the cashier, and not by reason of any act of the book-keeper as such. This court held that, if the fact was as the sureties alleged, they were right in their legal position; but, as the embezzlement occurred before their principal was duly appointed cashier, the capacity in which he was acting at the time was a question for the jury, on which the sureties had a right to be heard. In the opinion delivered by our late Brother Clark it is said: "Neither the imposition of additional, distinct, and consistent duties, nor the appointment of the principal to an additional office, would necessarily relieve the surety on his bond, if the new duties or the new office have no such connection with the old as to interfere with or affect the original employment." The book-keeper, as such, had no access to the funds of his employer. When he was put in charge of them as cashier he had new duties and responsibilities put upon him, which were not in contemplation of his sureties when they entered into their undertaking on his behalf. If his default was in the discharge of his new duties, and these were not such as in the temporary absence or removal of a cashier were incidental to his employment, until a new cashier could be secured, then his sureties were not liable. If, on the other hand, his duties under his *pro tempore* appointment are such as are incidental to an employment as book-keeper, then the liability on their bond was not relieved against, and the plaintiff was entitled to recover. This does not support the position contended for in this case. Huggard's appointment was to the office of cashier. The defendants gave their bond to secure his fidelity in the performance of the duties of that office. It was as cashier that he embezzled and misappropriated funds that it was his duty to deal honestly with, so that the breach of the condition of the bond was conceded. The extra work done by him on the books, by virtue of his employment to keep the individual ledger, was the sole reliance of the defendants. But what change did this extra work make in his duties as cashier? It did not affect his custody of the

money of the bank. It did not increase his responsibilities as an officer, or his opportunities for embezzlement. The most that it suggested is that it might afford some help in the temporary concealment of his crime. Under the rule laid down in Telegraph Co. v. Lennig, *supra*, this is not enough. The new duties or the new office must be such as to interfere with or modify the old. If they are not, the sureties cannot complain. It is not enough that some change in the work of the appointee, the principal has been made. It must also appear that the change was such as to interfere with or modify the duties for the faithful performance of which the sureties are bound, so as to make it inequitable to enforce their undertaking upon a state of facts not within the contemplation of the parties when it was made.

GIFTS OF PERSONAL PROPERTY.

1. Definition.
2. Distinction Between a Sale and a Gift.
3. Distinction Between a Gift and an Advancement.
4. Who May Make a Gift.
5. Who May Take a Gift.
6. What May be Given.
7. Legality of Gift.

1. *Definition.*—A gift of personal property is a transfer of the same without receiving a valuable consideration therefor in return. All gifts are said to be either *inter vivos* or *causa mortis*. A gift *inter vivos* is an immediate, voluntary and gratuitous transfer of personal property by one person to another person, association or corporation;[1] while a gift *causa mortis*, or "*donatio mortis causa*," as it is sometimes termed, is a gift made by the delivery of personal property by the donor in his last sickness and in expectation of death, then imminent, and upon the condition that it shall belong to the donee if the donor dies as expected, without revoking the gift, leaving the donee him surviving.[2] To constitute a good gift *causa mortis*, there must be complete delivery and retention of possession by the donee.[3]

2. *Distinction Between a Sale and a Gift.*—The distinction between a sale and a gift is this: A gift is a present transfer without a valuable consideration in money or other property or thing whatever; while a sale is the transfer of the absolute or general property of a thing for a price in money,[4] paid or promised to be paid by the person to whom the transfer is made, or by some one for him.[5] Blackstone in his commentaries[6] defines a sale as "a transmutation of property from one person to another in consideration of some price." Kent says that a sale is "a contract for the transfer of property from one person to another for a valuable consideration;[7] but this definition includes barter as well as sale, which, though in some respects analogous, certainly is not identical with a sale. To constitute a sale there must be an intention on the one part to buy, and on the other to sell[8]—a mutual assent of the parties on the object to be sold and the price to be paid;[9] that is, a transfer of the absolute or general property in the thing for a price in money.[10] The Supreme Court of the United States say in the case of Williamson v. Berry:[11] "We remark that sale is a word of precise legal import, both at law and in equity; it means at all times a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold.[12] This language of the Supreme Court of the United States is quoted with approval by the Supreme Court of Pennsylvania in the case of Bigley v. Risher.[13] A sale has also been described as an agreement by which one of the contracting parties, called the seller, gives a thing and passes title to it, in exchange for a certain price in money to another party, who is termed the buyer or purchaser, and who on his part agrees to pay such price.[14] If the consider-

[1] Flanders v. Blandy, 45 Ohio St. 108, 12 N. E. Rep. 321.

[2] See Henschel v. Maurer, 69 Wis. 576, 34 N. W. Rep. 936; Dunbar v. Dunbar, 80 Me. 152, 13 Atl. Rep. 578; Perry v. Perry (Pa.), 8 Atl. Rep. 450.

[3] Henschel v. Maurer, 69 Wis. 576, 34 N. W. Rep. 926; Dunbar v. Dunbar, 80 Me. 152, 13 Atl. Rep. 578.

[4] 1 Kerr's Benjamin on Sales, § 1.

[5] See Commonwealth v. Packard, 71 Mass. (5 Gray), 101.

[6] 2 Black. Com. 446.

[7] 2 Kent's Com. (12th ed.) 468.

[8] Binford v. Adams, 104 Ind. 41. See Smith v. Sawyer, 55 Me. 159; Willis v. Hobson, 37 Me. 405; Greening v. Patten, 51 Wis. 150.

[9] Nance v. Metcalf, 19 Mo. App. 183.

[10] *Id.*

[11] 49 U. S. (8 How.) 495; bk. 12, Lond. ed. 1170.

[12] See Noy's Maxims, ch. 42; Shep. Touch. 244.

[13] 63 Pa. St. 152-155. See also Parkinson v. State, 14 Md. 184, 74 Am. Dec. 522; Hutchmatcher v. Harris' Admr., 38 Pa. St. 491, 80 Am. Dec. 502; Massey v. State, 74 Ind. 368; Edwards v. Cottrell, 43 Iowa, 194, 204; Gardner v. Lane, 94 Mass. (12 Allen), 39; De Fonclear v. Shottenkirk, 3 Johns. (N. Y.) 170; Whittosky v. Wasson, 71 N. C. 451; Mackaness v. Long, 85 Pa. St. 158, 163; Atkinson on Sales, 5.

[14] Eldredge v. Kuhl, 27 Iowa, 160, 173; Madison Avenue Baptist Church v. Baptist Church, 46 N. Y. 131, 139; 2 Bouv. L. Dict. (15th ed.) tit. Sale, 606; Winfield, Words, etc. 547; Stim. Am. Stat. 4560.

ation be other than money, as the giving of other wares, the transaction constitutes a technical barter. The legal effect, however, is generally the same, and the same rules of law apply to both.[15] The Supreme Court of Vermont say in the case of State v. O'Neil,[16] that "the owner must intend to part with his property, and the purchaser to become the immediate owner; their two minds must meet on this point, and if anything remains to be done before their assent, it may be an inchoate contract, but it is not a perfect contract of sale."[17] Phillips, P. J., of the Kansas City Court of Appeals, says, in the recent case of Nance v. Metcalf,[18] that "at common law all bargains and sales of personal property is a transfer of the absolute property in the thing for a price in money."[19] The Supreme Judicial Court of Massachusetts have said that "the ordinary definition of a sale is transmutation of property from one person to another for a price, does not fully express the essential elements which enter into and make up a contract; a more complete enumeration of this would be competent parties to enter into the contract, an agreement to sell, and the mutual assent of the parties to the subject-matter of the sale, and to the price to be paid therefor."[20] The Supreme Court of Iowa say, in the case of Eldredge v. Kuehl,[21] that "the word 'sale' is defined by Bouvier in his law dictionary to be an agreement by which one of the contracting parties, called the seller, gives a thing and passes title to it for a certain price, in current money, to the party who is called the buyer or purchaser, who on his part agrees to pay such price." In Connecticut, however, a sale is said to be "a transmutation of property from one to another, accompanied, whenever it is practicable, with a delivery of the article to the purchaser.[22] It is so much of the essence of a sale that there be a delivery of the possession, that to permit the chattel sold to remain in the hands of the vendor is an extraordinary exception to the usual course of dealing, and requires a satisfactory explanation." The limitations contained in this opinion, however, are not in accord with the prevailing doctrine in this country, where the contract of sale does not provide for the delivery by the vendor.

3. *Distinction Between a Gift and an Advancement.*—An advancement may be defined to be a gift by the parent to the child or heir by way of anticipation of the whole or part of what it is supposed the donee will be entitled to inherit on the death of the donor;[23] and the very fact of making the gift by way of advancement implies the exercise of judgment, and of an intention to do a thing which may have a future effect; whereas, in the making of a gift, pure and simple, no exercise of judgment as to future results which may happen is involved.[24] Whether a gift by a parent to a child is to be deemed an advancement depends upon the intention of the donor, which is to be gathered from the attending circumstances.[25] While it is true that a transfer of property by a parent to a child is *prima facie* an advancement, and not a gift, yet it may be shown by parol that it was intended as a gift and not as an advancement;[26] and it is equally well settled that a gift to one entitled as a child to share in the donor's estate will not be held to be an advancement, when it expressly appears to have been the intention of the father that the gift should not be considered as such.[27] Where it does not appear that the gift was expressed or charged in writing to be an advancement, or was not acknowledged in writing by the donee to be an advancement, it cannot be deemed to be such under the provisions of section 7 of the Illinois act of 1872.[28] And where a conveyance has been made by a father to a child, the subsequent declarations of the

[15] Commonwealth v. Clark, 80 Mass. (14 Gray), 372; Nance v. Metcalf, 19 Mo. App. 183.

[16] 58 Vt. 140.

[17] See Mason v. Thompson, 35 Mass. (18 Pick.) 305.

[18] 19 Mo. App. 183.

[19] And see Commonwealth v. Clark, 80 Mass. (14 Gray), 372.

[20] Gardner v. Lane, 94 Mass. (12 Allen), 39, 43.

[21] 27 Iowa, 160, 173.

[22] Patten v. Smith, 5 Conn. 196, 199, 10 Am. Dec. 166. See also Hilliard on Sales. 1.

[23] Wallace v. Reddick, 119 Ill. 151; McMahill v. McMahill, 69 Iowa, 115. But where an heir has taken possession under an agreement for an advancement, but without a title, and he elects to share equally with the other heirs in the residue of the estate, equity will not wrong the other heirs by decreeing an enforcement of the parent's promise to convey to him the specific property as an advancement. McMahill v. McMahill, 69 Iowa, 115.

[24] Wallace v. Reddick, 119 Ill. 151.

[25] Comer v. Comer, 119 Ill. 170; Wallace v. Reddick, 119 Ill. 151.

[26] Wolfe v. Kable, 107 Ind. 565.

[27] De Caumont v. Morgan, 104 N. Y. 73.

[28] Wallace v. Reddick, 119 Ill. 151.

father may be received in evidence for the purpose of showing that it was not an advancement, but was intended as a gift, pure and simple.[29] It is said by the Supreme Court of Tennessee, in the recent case of Aden v. Aden,[30] that a provision in a deed that the property therein conveyed shall not be regarded as an advancement is good; and that this is true even when the will of the grantor, afterwards executed, recites that all money or property given his children shall be taken into final account to enable them to share equally.

4. *Who May Make a Gift.*—Any person capable of transacting the ordinary affairs of life, and of entering into contracts, may make a gift, provided only that the donor is free from debt at the time, so that his act does not interfere with his obligations to others, or the gift is not made with a design to defraud some one out of their legal and vested rights. Thus, it has been said that a person of sound mind, even when *in extremis*, may make a partial as well as a total disposition by gift of his property which at the time is subject to gift.[31] In the absence of any statutory prohibition, a husband may make a partial or total distribution of his property by gift.[32] But where the husband, in contemplation of death, gives to his children the whole of his personal estate, including his money, *choses in action*, etc., with the fraudulent intention to deprive his wife of the interest therein which she would be entitled to as his widow, the gift will be set aside at the instance of such widow, in so far as it affects her rights;[33] and it will be no response to her claim to her right in such personal property, that her dower interest in the land left by her husband is sufficient to support her.[34]

5. *Who May Take a Gift.*—Any person may take a gift except those who stand in relations of trust and confidence, and such as are prohibited by the statutory enactment. The general rule is that a trustee cannot take beneficially, either by gift or purchase, from his *cestui que trust*;[35] and in a case where an aged and infirm grantor, at a time when he was greatly excited through fear of losing his property because of threatened litigation, voluntarily conveyed all of it, being advised to do so, to one standing in the relation of trustee to him under a prior conveyance in trust of the same property, the court held that the conveyance was invalid, as being unfair, inequitable and hastily made,[36] saying that such a conveyance should be treated as in fraud of creditors, and that the aid of the court to recover the property should not be refused. The same principle that governs as to trustees applies to persons standing in confidential relations also.[37] Thus, in a case where a son enjoyed the confidence of his aged mother, and exercised great influence over her, and confidential relations existed between them, the burden was held to be on such son to show, aside from the formal way by which the gift passed to his credit, that it was in fact a gift.[38] While relationship of itself is not a badge of fraud in a sale, yet equity will, for the protection of minor children, look with jealousy upon gifts and sales by them to parents,[39] because a child is presumed to be under the exercise of the parental influence so long as the dominion of the parent lasts; and in such a case the burden of proof lies with the parent maintaining a gift from such child to disprove the exercise of such influence.[40] Thus, where the defendant, by importunity and misrepresentation, obtained a deed from her daughter, who at the time of executing the conveyance was only about seventeen years of age and still lived with her mother, notwithstanding the fact that she had been recently married, it appearing that the deed had been made in entire ignorance of her rights, it was not allowed to stand.[41] An attorney occupies such a confidential relation to his client that any gift from the latter to him is looked upon with suspicion; and it was held by the Su-

[29] See Nelson v. Nelson, 90 Mo. 460, and authorities cited.

[30] 16 Lea (Tenn.), 453.

[31] Henschel v. Maurer, 69 Wis. 576, 34 N. W. Rep. 926; Dunbar v. Dunbar, 80 Me. 152, 13 Atl. Rep. 578.

[32] It is said in the case of Connor v. Root, 11 Colo. 183, 17 Pac. Rep. 773, that under the Colorado statutes coverture is no obstacle to the making of a gift *causa mortis*.

[33] Manikee v. Beard, 85 Ky. 20, 2 S. W. Rep. 545.

[34] *Id.*

[35] Nichols v. McCarthy, 53 Conn. 299, and authorities cited.

[36] *Id.*

[37] *Id.*

[38] Parker v. Parker (N. J.), 4 Cent. Rep. 67.

[39] See Baldock v. Johnson, 14 Oreg. 542; State v. True, 20 Mo. App. 176, 2 West Rep. 602.

[40] Baldock v. Johnson, 14 Oreg. 542. See Nichols v. McCarthy, 53 Conn. 299.

[41] Baldock v. Johnson, 14 Oreg. 542.

preme Court of New Hampshire, in the recent case of Whipple v. Barton,[42] that to sustain a gift from a client to his attorney, of a sum in excess of the fee allowed by law for procuring a pension, the burden of proof is upon the attorney to show to the satisfaction of the court not only that the gift was a voluntary one, but also that it was made with full knowledge of all the material facts known to the attorney, and that it was without any undue influence.[43] The same is true respecting a gift made to a minister or a physician.[44] The *onus* is always on the donee to prove all the things essential to sustain a conveyance as a gift;[45] and undue influence as to a gift *inter vivos* may be shown by evidence of influence by the donee in other matters.[46]

6. *What May be Given.*—A person may make a gift, where the same is subject to gift as hereinbefore explained, either *inter vivos* or *causa mortis*, of lands,[47] goods,[48] chattels,[49] moneys,[50] and every other kind of personal property;[51] as an account,[52] the accrued interest on bonds[53] or on a note,[54] bonds themselves,[55] or the coupons thereof,[56] a certificate of deposit,[57] a deposit in a bank,[58] or a deposit in a savings bank,[59] a check on a bank where money is deposited,[60] a *chose in action*[61] a colt,[62] a debt,[63] or the balance of a debt,[64] an insurance policy,[65] a grist mill,[66] a mortgage of chattels or of lands,[67] non-negotiable securities,[68] a promissory note,[69] a piano, although not yet paid

[42] 63 N. H. 612.

[43] See Nichols v. McCarthy, 53 Conn. 658.

[44] See Woodbury v. Woodbury, 141 Mass. 329.

[45] Nichols v. McCarthy, 53 Conn. 299.

[46] Woodbury v. Woodbury, 141 Mass. 329.

[47] See Johnson v. Griffin, 80 Ga. 551, 7 S. E. Rep. 94; Crue v. Caldwell, 52 N. J. L. (23 Vr.) 215, 19 Atl. Rep. 188; Wilkinson v. Sherman, 45 N. J. Eq. (18 Stew.) 413, 18 Atl. Rep. 228; Catoe v. Catoe, 32 S. C. 595, 10 S. E. Rep. 1078; Dilts v. Stewart (Pa.), 1 Atl. Rep. 587, 1 Cent. Rep. 606; Nailor v. Nailor (D. C.), 3 Cent. Rep. 777; Hess v. Brown, 111 Pa. St. 124; Wallace v. Reddick, 119 Ill. 151; Polly v. Polly, 82 Ky. 64; Adamson v. Lamb, 3 Blackf. (Ird.) 446; Young v. Glendening, 6 Watts (Pa.), 509; Syler v. Eckhart, 1 Binn (Pa.), 378; Worcester v. Eaton, 13 Mass. 371; Sargent v. Baldwin, 60 Vt. 17, 13 Atl. Rep. 854; Ruch v. Biery, 110 Ind. 444, 11 N. E. Rep. 312; Dozier v. Matson, 94 Mo. 328, 7 S. W. Rep. 268.

[48] Dickerschied v. Exchange Bank, 28 W. Va. 34. See Tyrrell v. York, 10 N. Y. Supp. 611, 32 N. Y. S. R. 368.

[49] Paulin v. Paulin, 79 Ga. 11, 4 S. E. Rep. 81; Dickerchied v. Exchange Bank, 28 W. Va. 341.

[50] Space v. Guest (N. J.), 10 Atl. Rep. 152; Williamson v. Johnson, 62 Vt. 378, 20 Atl. Rep. 279, 9 L. R. A. 277, 12 Ky. L. Rep. 295; Love v. Francis, 63 Mich. 181, 5 West. Rep. 753; *In re* Stephen's Estate, 83 Cal. 322, 23 Pac. Rep. 379. Money paid by a railroad to the widow of an employee who was killed on the road "as an allowance" is a gift to her individually. *In re* Stephen's Estate, 83 Cal. 322, 23 Pac. Rep. 379. And money paid by a stepfather standing *in loco parentis* on a mortgage on the real estate of his stepchildren, has been held to be a gift to them in Capek v. Kropik (Ill.), 21 N. E. Rep. 836.

[51] Lowther v. Lowther, 30 W. Va. 103, 3 S. E. Rep. 42. See Tyrrell v. York, 10 N. Y. Supp. 611, 32 N. Y. S. R. 368.

[52] See Haines v. Haines (N. J.), 15 Atl. Rep. 839.

[53] Rowe v. Merchant (Va.), 9 S. E. Rep. 995, 13 Va. L. J. 607.

[54] *In re* Lewis' Estate, 139 Pa. St. 640, 22 Atl. Rep. 635.

[55] Peters v. Fort Madison Constr. Co., 72 Iowa, 405, 34 N. W. Rep. 190; Vandor v. Roach, 73 Cal. 61, 15 Pac. Rep. 354; Moore's Succession, 40 La. Ann. 531, 4 South. Rep. 460; Pink v. Church, 14 N. Y. Supp. 337, 38 N. Y. S. R. 735; Matthews v. Hoagland (N. J.), 21 Atl. Rep. 1054; Love v. Francis, 63 Mich. 181, 5 West. Rep. 753; Yancey v. Field (Va.), 8 S. E. Rep. 721, 13 Va. L. J. 158; Flanders v. Blandy, 45 Ohio St. 108, 12 N. E. Rep. 321. See Backer v. Meyer, 43 Fed. Rep. 702.

[56] See *In re* Crawford, 113 N. Y. 560, 21 N. E. Rep. 693, 23 N. Y. S. R. 722.

[57] *In re* Dillon, L. R. 44 Ch. Div. 76. See Cormer v. Root, 11 Colo. 183, 17 Pac. Rep. 773.

[58] Drew v. Hagerty, 81 Me. 231, 17 Atl. Rep. 631, 3 L. R. A. 230; *In re* Crawford, 113 N. Y. 560, 21 N. E. Rep. 692, 23 N. Y. S. R. 722; Daugherty v. Moore (Md.), 18 Atl. Rep. 35, 17 Wash. L. Rep. 508; Walsh's Appeal, 122 Pa. St. 177, 15 Atl. Rep. 470, 22 W. N. C. 258, 1 L. R. A. 535, 19 Pittsb. L. J. (N. S.) 212; Miller v. Clark, 40 Fed. Rep. 15.

[59] Ridden v. Thrall, 125 N. Y. 572, 26 N. E. Rep. 627, 11 L. R. A. 634, 35 N. Y. S. R. 913, affirming 55 Hun, 185, 7 N. Y. Supp. 822, 27 N. Y. S. R. 947, 24 Abb. N. C. (N. Y.) 52; Flower v. Bowery Savings Bank, 47 Hun, 399, 14 N. Y. S. R. 515; reversed on other grounds in 113 N. Y. 459, 21 N. E. Rep. 172, 4 L. R. A. 145, 23 N. Y. S. R. 130, 39 Alb. L. J. 468, 23 Abb. N. C. (N. Y.) 113; Scott v. Harbeck, 49 Hun, 292, 17 N. Y. S. R. 690; Walsh v. Bowery Savings Bank, 28 N. Y. S. R. 402; Mack v. Mechanics and Farmers' Savings Bank, 50 Hun, 477, 20 N. Y. S. R. 247; Schollmier v. Schoendelen, 78 Iowa, 426, 43 N. W. Rep. 282.

[60] Stauffer v. Morgan, 39 La. Ann. 642, 2 South. Rep. 98; Priest v. Way, 87 Mo. 16.

[61] Sterling v. Wilkinson, 83 Va. 791, 3 S. E. Rep. 533.

[62] Porter v. Gardner, 15 N. Y. Supp. 398, 39 N. Y. S. R. 671.

[63] Snowden v. Reid, 67 Md. 130, 10 Atl. Rep. 175.

[64] McKenzie v. Harrison, 120 N. Y. 260, 24 N. E. Rep. 458, 30 N. Y. S. R. 934, 8 L. R. A. 257, 18 Wash. L. R. 449.

[65] Hurlburt v. Hurlburt, 49 Hun, 189, 17 N. Y. S. R. 31.

[66] Paulain v. Paulain, 79 Ga. 11, 4 S. E. Rep. 81.

[67] Gilman v. McArdle, 99 N. Y. 451; Cerney v. Pawlot, 66 Wis. 262; Stone v. Jenks, 142 Mass. 519; Story v. Story, 41 N. J. Eq. 370; Henschel v. Maurer, 69 Wis. 576, 34 N. W. Rep. 926.

[68] Commonwealth v. Crompton, 137 Pa. St. 138, 20 Atl. Rep. 417, 48 Phila. L. Int. 26.

[69] Cerney v. Pawlot, 66 Wis. 262; Hopkins v. Manchester, 16 R. I. 663, 19 Atl. Rep. 243, 7 L. R. A. 388; Bingham v. Stage, 123 Ind. 281, 23 N. E. Rep. 756;

for, bought on the installment plan,[70] rents due and to become due,[71] a ring,[72] stocks[73] and the like. It is hardly necessary to remark that where a person holds property simply as a trustee, simply has the paper-title and not the equitable title, that he cannot make a valid gift of the same. In Livingston v. Livingston,[74] a Nebraska case, where property was bought and paid for by two brothers jointly, and the title placed by one of them in the name of their mother, to be held by her to protect the interest of the other, and until other arrangements were made, a reconveyance by the mother to both was held not to be a gift, but a conveyance in recognition of their ownership. While it is true that a creditor can make a gift of a debt or a portion of a debt, as stated above, yet a creditor cannot make a gift to the debtor of his debt, except by the delivery up of the instrument evidencing the debt, or by an assignment or release in writing of the debt itself.[75]

7. *Legality of Gifts.*—In the absence of any statutory prohibition a gift is legal, where the property is subject to be given, as above set forth, whether given for a temporal or religious[76] purpose, provided only that the purpose for which it is given is a legal one. But in some of the States, as in Louisiana, the statute[77] prohibits donations of gifts of the whole of one's property, without reserving sufficient for subsistence; and also prohibits the reservation of the usufruct of the lands donated or given.[78] Each gift must stand on its own bottom, and the fact that a person attempts at the same time, and as a part of the same transaction, to dispose of the whole of his property by gift, but for some cause the disposition is ineffectual as to a part of it, this will not prevent it from being effectual as to the other part of it.[79] A gift made for an immoral or an illegal purpose, or for the purpose of promoting an illegal or an immoral object, would of course be invalid; and while a gift as an inducement to illicit cohabitation would be invalid, yet the fact of past cohabitation will not of itself render a gift by the party holding such a relation to a woman void or illegal.[80] Any undue influence exerted by the donee will render the gift invalid, notwithstanding that there was no concentrated effort or conspiracy to influence the donor, and that he was not influenced to make the gift by all the parties benefited thereby.[81] And any fraudulent intent or purpose on the part of the donor will render the gift illegal in so far, at least, as to the extent of fraud or injury wrought to others. Thus, in Manikee v. Beard,[82] where the husband, in contemplation of death, gave to his children the whole of his personal estate, including his money, *choses in action*, etc., with the fraudulent intention to deprive his wife of the interest therein to which she would be entitled as his widow, the gift was set aside at the instance of the widow, in so far as it affected her rights, the court remarking that it was no response to her claim that her dower interest in the land left by her husband was sufficient to support her; she had been wronged and was entitled to redress at the hands of the court.

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Love v. Francis, 63 Mich. 181, 5 West. Rep. 758. See Gray v. Nelson, 77 Iowa, 63, 41 N. W. Rep. 566; Thweatt v. McCullough, 84 Ala. 517, 5 Am. St. Rep. 391, 4 South. Rep. 399; Keyl v. Westerhaus, 42 Mo. App. 49; Marston v. Marston, 64 N. H. 446, 2 N. Eng. Rep. 865.

[70] Hatch v. Lamos (N. H.), 17 Atl. Rep. 979, 4 L. R. A. 404.

[71] See Wells v. Collins, 74 Wis. 341, 43 N. W. Rep. 160, 5 L. R. A. 531.

[72] Van Slooten v. Wheeler, 15 N. Y. Supp. 591, 39 N. Y. S. R. 866.

[73] Matthews v. Hoagland (N. J.), 21 Atl. Rep. 1054. See Morse v. Weston (Mass.), 24 N. E. Rep. 916; Baltimore Retort & F. B. Co. v. Mali, 65 Md. 93.

[74] 45 N. W. Rep. 233.

[75] Snowden v. Reid, 67 Md. 130, 10 Atl. Rep. 175.

[76] Gifts to secure mass for the dead are valid. Gilman v. McArdle, 99 N. Y. 451, and cases cited.

[77] La. Civ. Code, arts. 1497, 1533.

[78] See Dopler's Succession, 40 La. Ann. 848, 6 South. Rep. 106; Straus v. Elliott (La.), 9 South. Rep. 102.

[79] Henschel v. Maurer, 69 Wis. 576, 34 N. W. Rep. 926; Dunbar v. Dunbar, 80 Me. 152, 13 Atl. Rep. 578.

[80] Smith v. Du Boise, 78 Ga. 413, 6 Am. St. Rep. 260, 3 S. E. Rep. 309.

[81] Muir v. Miller (Iowa), 47 N. W. Rep. 1011, affirmed in 48 N. W. Rep. 1032.

[82] 85 Ky. 20, 2 S. W. Rep. 545.

OWNERSHIP OF AEROLITE — APPROPRIATION BY FINDER.

GOODARD V. WINCHELL.

Supreme Court of Iowa, Oct. 4, 1892.

1. An aerolite weighing 66 pounds, which falls from the sky and is imbedded in the soil to a depth of three feet, is the property of the owner of the land on which it falls, rather than of the first person who finds it and digs it up.

2. The rule that the finder of lost goods is entitled thereto, except as against the true owners, is not applicable to such case.

GRANGER, J.: The district court found the following facts, with some others, not important on this trial: "That the plaintiff, John Goodard, is, and has been since about 1857, the owner in fee simple of the north half of section No. three, in township No. ninety-eight, range No. twenty-five, in Winnebago County, Iowa, and was such owner at the time of the fall of the meteorite hereinafter referred to. (2) That said land was prairie land, and that the grass privilege for the year 1890 was leased to one James Elickson. (3) That on the 2d day of May, 1890, an aerolite passed over northern and northwestern Iowa, and the aerolite, or fragment of the same, in question in this action, weighing, when replevied, and when produced in court on the trial of this cause, about 66 pounds, fell onto plaintiff's land, described above, and buried itself in the ground to the depth of three feet, and became imbedded therein at a point about 20 rods from the section line on the north. (4) That the day after the aerolite in question fell it was dug out of the ground with a spade by one Peter Hoagland, in the presence of the tenant, Elickson; that said Hoagland took it to his house, and claimed to own same, for the reason that he had found same and dug it up. (5) That on May 5, 1890, Hoagland sold the aerolite in suit to the defendant, H. V. Winchel, for $105, and the same was at once taken possession of by said defendant, and that the possession was held by him until same was taken under the writ of replevin herein; that defendant knew at the time of his purchase that it was an aerolite, and that it fell on the prairie south of Hoagland's land. * * * (10) I find the value of said aerolite to be one hundred and one dollars ($101) as verbally stipulated in open court by the parties to this action; that the same weighs about 66 pounds, is of a black, smoky color on the outside, showing the effects of heat, and of a lighter and darkish gray color on the inside; that it is an aerolite, and fell from the heavens on the 2d of May, 1890; that a member of Hoagland's family saw the aerolite fall, and directed him to it." As conclusions of law, the district court found that the aerolite became a part of the soil on which it fell; that the plaintiff is the owner thereof; and that the act of Hoagland in removing it was wrongful. It is insisted by appellant that the conclusions of law are erroneous; that the enlightened demands of the time in which we live call for, if not a modification, a liberal construction, of an ancient rule, "that whatever is affixed to the soil belongs to the soil," or, the more modern statement of the rule, that "a permanent annexation to the soil, of a thing in itself personal, makes it a part of the realty." In behalf of appellant is invoked a rule alike ancient and of undoubted merit, "that of title by occupancy;" and we are cited to the language of Blackstone, as follows: "Occupancy is the taking possession of those things which before belonged to nobody;" and "whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor, and as such are returned into the common stock and mass of things; and therefore they belong, as in a state of nature, to the first occupant or finder." In determining which of these rules is to govern in this case, it will be well for us to keep in mind the controlling facts giving rise to the different rules, and note, if at all, wherein the facts of this case should distinguish it. The rule sought to be avoided has alone reference to what becomes a part of the soil, and hence belongs to the owner thereof, because attached or added thereto. It has no reference whatever to an independent acquisition of title; that is, to an acquisition of property existing independent of other property. The rule invoked has reference only to property of this independent character, for it speaks of movables "found upon the surface of the earth or in the sea." The term "movables" must not be construed to mean that which can be moved, for, if so, it would include much known to be realty; but it means such things as are not naturally parts of the earth or sea, but are on the one or in the other. Animals exist on the earth and in the sea, but they are not, in a proper sense, parts of either. If we look to the natural formation of the earth and sea, it is not difficult to understand what is meant by "movables," within the spirit of the rule cited. To take from the earth what nature has placed there in its formation, whether at the creation or through the natural processes of the acquisition and depletion of its particular parts, as we witness it in our daily observations, whether it be the soil proper or some natural deposit, as of mineral or vegetable matter, is to take a part of the earth, and not movables.

If, from what we have said, we have in mind the facts giving rise to the rules cited, we may well look to the facts of this case to properly distinguish it. The subject of the dispute is an aerolite, of about 66 pounds' weight, that "fell from the heavens" on the land of the plaintiff, and was found three feet below the surface. It came to its position in the earth through natural causes. It was one of nature's deposits, with nothing in its material composition to make it foreign or unnatural to the soil. It was not a movable thing "on the earth." It was in the earth, and in a very significant sense immovable; that is, it was only movable as parts of earth are made movable by the hand of man. Except for the peculiar manner in which it came, its relation to the soil would be beyond dispute. It was in its substance, as we understand, a stone. It was not of a character to be thought of as "unclaimed by any owner," and, because unclaimed, "supposed to be abandoned by the last proprietor," as should be the case under the

rule invoked by appellant. In fact, it has none of the characteristics of the property contemplated by such a rule.

We may properly note some of the particular claims of appellant. His argument deals with the rules of the common law for acquiring real property, as by escheat, occupancy, prescription, forfeiture, and alienation, which it is claimed were all the methods known, barring inheritance. We need not question the correctness of the statement, assuming that it has reference to original acquisition, as distinct from acquistions to soil already owned, by accretion or natural causes. The general rules of the law, by which the owners of riparian titles are made to lose or gain by the doctrine of accretions, are quite familiar. These rules are not, however, of exclusive application to such owners. Through the action of the elements, wind and water, the soil of one man is taken and deposited in the field of another; and thus all over the country, we may say, changes are constantly going on. By these natural causes the owners of the soil are giving and taking as the wisdom of the controlling forces shall determine. By these operations one may be affected with a substantial gain, and another by a similar loss. These gains are of accretion, and the deposit becomes the property of the owner of the soil on which it is made.

A scientist of note has said that from six to seven hundred of these stones fall to our earth annually. If they are, as indicated in argument, departures from other planets, and if among the planets of the solar system there is this interchange, bearing evidence of their material composition, upon what principle of reason or authority can we say that a deposit thus made shall not be of that class of property that it would be if originally of this planet and in the same situation? If these exchanges have been going on through the countless ages of our planetary system, who shall attempt to determine what part of the rocks and formations of especial value to the scientist, resting in and upon the earth, are of meteoric acquisition, and a part of that class of property designated in argument as "unowned things," to be the property of the fortunate finder instead of the owner of the soil, if the rule contended for is to obtain? It is not easy to understand why stones or balls of metallic iron, deposited as this was, should be governed by a different rule than obtains from the deposit of boulders, stones, and drift upon our prairies by glacier action; and who would contend that these deposits from floating bodies of ice belong, not to the owner of the soil, but to the finder? Their origin or source may be less mysterious, but they, too, are "telltale messengers" from far-off lands, and have value for historic and scientific investigation.

It is said that the aerolite is without adaptation to the soil, and only valuable for scientific purposes. Nothing in the facts of the case will warrant us in saying that it was not as well adapted for use by the owner of the soil as any stone, or as appellant is pleased to denominate it, "ball of metallic iron." That it may be of greater value for scientific or other purposes may be admitted, but that fact has little weight in determining who should be its owner. We cannot say that the owner of the soil is not as interested in, and would not as readily contribute to, the great cause of scientific advancement, as the finder, by chance or otherwise, of these silent messengers. This aerolite is of the value of $101, and this fact, if no other, would remove it from uses where other and much less valuable materials would answer an equally good purpose, and place it in the sphere of its greater usefulness.

The rule is cited, with cases for its support, that the finder of lost articles, even where they are found on the property, in the building, or with the personal effects of third persons, is the owner thereof against all the world except the true owner. The correctness of the rule may be conceded, but its application to the case at bar is very doubtful. The subject of this controversy was never lost or abandoned. Whence it came is not known, but, under the natural law of its government, it became a part of this earth, and, we think, should be treated as such. It is said by appellant that this case is unique; that no exact precedent can be found; and that the conclusion must be based largely upon new considerations. No similar question has, to our knowledge, been determined in a court of last resort. In the American and English Encylopedia of Law (volume 15, p. 388) is the following language: "An aerolite is the property of the owner of the fee upon which it falls. Hence a pedestrian on the highway, who is first to discover such a stone, is not the owner of it; the highway being a mere easement for travel." It cites the case of Maas v. Amana Soc., 16 Alb. Law J. 76, and 13 Ir. Law T. 381, each of which periodicals contains an editorial notice of such a case having been decided in Illinois, but no reported case is to be found. Anderson's Law Dictionary states the same rule of law, with the same references, under the subject of "Accretions." In 20 Alb. Law J. 299, is a letter to the editor from a correspondent, calling attention to a case determined in France, where an aerolite found by a peasant was held not to be the property of the "proprietor of the field," but that of the finder. These references are entitled, of course, to slight, if any, consideration; the information as to them being too meager to indicate the trend of legal thought. Our conclusions are announced with some doubts as to their correctness, but they arise not so much from the application of known rules of law to proper facts as from the absence of defined rules for these particular cases. The interest manifested has induced us to give the case careful thought. Our conclusions seem to us nearest analogous to the generally accepted rules of law bearing on kindred questions, and to subserve the ends of substantial justice. The question we have discussed is con-

trolling in the case, and we need not consider others.

The judgment of the circuit court is affirmed.

NOTE.—In the study of the principal case, care must be taken to distinguish between the several kinds of title to property, viz., that by accession, accretion and by finding. Accession is where a thing which belongs to one person becomes the property of some one else, by reason of its becoming added to or incorporated with, a thing belonging to the latter. Thus, building a rail fence on another's land, vests the rails in the owner of the land. Wentz v. Fincher, 12 Ired. 297, 55 Am. Dec. 416. And see Merritt v. Johnson, 7 Johns. 473; Pulcifer v. Page, 32 Me. 404, 54 Am. Dec. 582. Where the materials of several persons are combined in one article, the property in the resulting thing is in the owner of the principal materials which went to make up the whole. Pulcifer v. Page, *supra;* Eaton v. Lynde, 15 Mass. 242.

Accretion, which may be called natural accession, is generally applied to the increase of real estate by the addition of portions of soil by gradual deposit through the operation of natural causes to that already in possession of the owner. 3 Washburn on Real Property, 451; Anderson's Dictionary of Law, 19. Examples of this are found in the addition to land by the receding of a river or other water, and as applied to personal property the natural increase of animals by breeding, the growth of a tree or the fruit on it, the production of ice on a pond by the frost. 2 Lawson's Rights, Remedies and Practice, 2323. These natural accessions belong in almost all cases to the owner of the principal thing to or on which they come. Thus a tree belongs to the owner of the land in which the root is, fruit on a tree to the owner of the tree (Waterman v. Soper, 1 Ld. Raym. 737), even where the limbs may overhang the land of another. Hoffman v. Armstrong, 46 Barb. 337. The ice belongs to the owner of the water on which it is formed. Higgins v. Custerer, 41 Mich. 318. Crops belong to the owner of the land on which they grow. Reilly v. Reyland, 38 Iowa, 106; Freeman v. McLennan, 26 Kan. 151. Plants and shrubs the growth of cuttings from plants and shrubs mortgaged, pass to the mortgagee by accession. Bryant v. Pennell, 61 Me. 108, 14 Am. Rep. 550. A dividend earned but not declared before a transfer, belongs to the owner of the stock when the dividend is declared, and not to the prior owner. Brundige v. Brundige, 65 Barb. 397.

In order to constitute a legal finding of property, three things are necessary, to-wit, the property must have been legally lost, the finder must take legal possession of the thing found, and the finder must act innocently in the matter and with entire honesty and good faith toward the owner. If at the time of finding, he knows the owner of the lost property or has the means at hand of knowing him or reasonably believes that he can be found, and with felonious intent converts the property to his own use, he is guilty of larceny. 7 Am. & Eng. Ency. of Law, 977. The finder of lost property is entitled to retain it as against all persons except the true owner. McAvoy v. Medina, 11 Allen, 548; Pinkham v. Gear, 3 N. H. 484; Lawrence v. Buck, 62 Me. 275; Tancil v. Seaton, 28 Gratt. 601; Durfee v. Jones, 11 R. I. 588. And the rights of a finder of lost property differ from the rights of one who, as in the principal case, comes across property which has been added by natural accretion, in this, that the finder's title is good, even as against one in whose house or on whose premises the lost article may be at the time. Thus the finder was held entitled to recover where he was the conductor or brakeman of a train and the article was found by him in the car, where it had been left by a passenger but the railroad company claimed it. New York & Harlem R. Co. v. Haws, 56 N. Y. 175; Tatum v. Sharpless, 6 Phila. 18. So where a customer found a purse on a shop floor and the shop keeper claimed it. Bridges v. Hawkesworth, 7 Eng. Law and Equity, 424. So an unmarked saw log, carried down stream lodged in a drift and unreclaimed for two years is lost property, and a former finder is entitled to it as against the riparain owner. Deaderick v. Oulds, 86 Tenn. 14. So as between the finder and the owner of a paper sack in which bank notes are found, the notes are the property of the finder. Bowen v. Sullivan, 62 Ind. 288. So also as between the finder and the keeper of an hotel in which money or other thing of value is found. Hamaker v. Blanchard, 90 Pa. St. 379. Property is not lost, however, in the sense of the rule if it was intentionally laid on a table, counter or other place by the owner who forgot to take it away. In such case the proprietor of the premises is entitled to the custody. When, however, the surroundings show that the article was deposited in its place the finder has no right to possession against the owner of the building. McAvoy v. Medina, *supra.* Lawrence v. State, 1 Humph. (Tenn.) 228; People v. McGarren, 17 Wend. 460; Kincaid v. Eaton, 98 Mass. 139.

Though, as the judges in the principal case say, it is impossible to find a case "on all fours" with the case presented, the reasoning of the court very clearly shows that the law as to natural accretions should govern, and that the finder of the aerolite gained no title whatever.

CORRESPONDENCE.

REGULATION OF RAILROAD RATES BY THE STATES.

To the Editor of the Central Law Journal:

In a recent number of your esteemed paper, volume 35, page 201, the leading editorial discusses the power of a State legislature, in the matter of the regulation and establishment of rates to be charged by *quasi* public enterprises, as illustrated by two recent cases, one in the United States Circuit Court for the District of Texas, the other in the Supreme Court of North Dakota. It is asserted on page 201 that the decision of a Minnesota case denying the power to fix rates absolutely and finally without judicial inquiry as to their reasonableness is eminently sound and proper; while on the very next page (202), it is maintained, "that the later decisions of the courts seem to have settled the following propositions: First that a State has absolute power to fix and prescribe rates and charges to be made, not only by railroad companies, but by any business enterprise which for any reason may be said to partake of a public character. Second, that the question of the reasonableness of a rate so fixed by the State legislature is not subject to judicial inquiry." The Minnesota case above seems to be authority for rejecting the first proposition as a principle of law; and, when approved of as "an eminently sound and proper conclusion," would apparently negative any such opinion as is deduced in proposition second.

Some of the "recent cases" examined, however, may have given color to the statements in the above propositions; but looking at the question from a common sense point of view, does it seem equitable that such power should be absolute, and, no matter how

arbitrarily exercised, subject to no redress? Does it not appear absurd that a rate, however grossly unreasonable, must remain unchallenged? One does not have to refer to Coke on Littleton, or quote the learned Blackstone to prove that "*Ratio est anima legis*" and that every statute when attacked, either in the State or federal courts, is examined and interpreted by the light of reason. When, therefore, the reason fails, and, as is assumed in the discussion, the rates become unreasonable, the existence of the statute or enactment should terminate. The question, however, is, who shall decide as to the reasonableness of the rate? The propositions above would leave the final decision to the legislature or to a commission by them appointed, thus making the same body judge of the reasonableness of its own enactment; whereas the true forum for the argument of such questions is in the courts.

The whole matter, however, is disposed of by Judge McCormick on page 301 of the same number of your JOURNAL in the United States case referred to above, who holds that "the question of the reasonableness of a rate of charge for transportation by a railway company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation. Thus proving that the power of the State is not absolute, being restrained by the United States constitution; and that proposition second, as to this recent case at least, is a "*non-sequitur*."

WM. W. GORDON, JR.

BOOK REVIEWS.

AMERICAN STATE REPORTS, Vol. 25.

An examination of the list of cases reported in this volume will disclose the diversified character of the subjects presented, and is a fair illustration of the general value of the series to the practitioner. The cases seem to cover almost all topics of the law, and in addition to the mass of cases reported, there are a great many valuable annotations. The following are worthy of special mention, viz.: Note to case of Louisville & Nashville R. R. Co. v. Johnson (Ala.), on subject of Intoxication as Contributory Negligence; Pico v. Cohn (Cal.), on Relief from Judgments obtained by Perjury; Carpenter v. Innes (Colo.), on Replevin against an Officer; Barton v. People (Ill.), on the Crime of Obtaining Goods or Money by False Pretenses; Western Paving & Supply Co. v. Citizens' Street R. R. Co. (Ind.), on the Rights, Duties and Obligations of Street Railway Corporations with Respect to the Streets; State v. Goodwill (W. Va.), where the fourteenth amendment is considered with relation to special privileges, burdens and restrictions.

ELLIOTT ON APPELLATE PROCEDURE.

The authors in the preface claim with reason that there is a sort of neutral ground between appellate procedure and trial court practice which authors do not permanently occupy although they do transiently enter upon it so that many matters of procedure lying within this neutral strip are not much considered and not even noticed. In treating therefore of appellate procedure they have combined such matters of trial court practice as are incident to appeals. They state that their effort has been "to make a practical treatise that will be of every day use and one that will if it does nothing more, at least supply hints and point the way to authorities which will enable the lawyer to find what he needs in the cases he is called upon to prepare for appeal and to conduct in the appellate tribunals." The extent and scope of the work is of such a character as that it would be impossible to define its incidental features. Suffice it to say that it covers the whole ground applicable to appellate tribunals, jurisdiction and practice.

The reputation of the authors, one of whom is a distinguished judge of the Supreme Court of Indiana and already known as the author of a number of treatises of merit, is a guarantee of the accuracy and exhaustiveness of the work. With our knowledge of the ability and industry of Judge Elliott and his son we would be willing to take the book upon faith if we had no means of determining its merit. We have given the book, however, as careful an examination as is possible, and have no reason to doubt its value to the practitioner.

The style in which it is prepared is admirable. The citation of authorities is very exhaustive. It has a first class index and is published by the Bowen-Merrill Company, Indianapolis.

WEEKS ON ATTORNEYS AND COUNSELORS AT LAW.

The first edition of this book appeared in 1878. This edition has been revised and enlarged by the adjudications of the last fourteen years, under the supervision of Charles Theodore Boone, author of a work on the "Law of Corporations." It states in an admirable manner the rules and legal principles governing attorneys and counselors at law in their vocation and in their professional relations with their clients. It would seem that every practitioner should have a direct interest in its pages.

It treats in successive chapters of the vocation of the lawyer, of admission to practice, of the jurisdiction of courts over attorneys, of the privileges of attorneys as officers of the court, of the disabilities of attorneys by reason of their profession, of their liability to third persons, of the privilege of professional communications, of retainer and authority to appear, of the authority and powers of attorneys by virtue of their retainer, of the duties of attorneys towards clients and of the liability of attorneys to their clients and of the liability of clients to their attorneys. It will thus be seen that it embraces in its scope everything that is of value or interest in the rules governing the rights and liabilities of attorneys in their professional capacity. The citation of cases seems to be exhaustive and the text is well prepared. The work embraces over 900 pages and is published by Bancroft-Whitney Company, San Francisco.

BOOKS RECEIVED.

The Law of By-laws of Private Corporations. By Louis Boisot, Jr., of the Chicago Bar. Published by the United States Corporation Bureau, Chicago, Ill. 1892.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ADMINISTRATORS.—An action to recover assets of a decedent used by the administrator to pay a fraudulent judgment confessed in his favor by decedent may be maintained by a creditor of such decedent, but cannot be maintained by an administrator *de bonis non*, unless he is also a creditor.—SPOON v. SMITH, S. Car., 15 S. E. Rep. 800.

2. APPEAL—Writ of Review.—Code Civil Proc. § 1068, provides that a writ of review may be obtained when a lower court has exceeded its jurisdiction: Held, that the hearing of a motion to dismiss an appeal from justice's court is within the jurisdiction of the superior court, and, though erroneously granted, a writ of review will not lie.—BUCKLEY v. SUPERIOR COURT OF FRESNO COUNTY, Cal., 31 Pac. Rep. 8.

3. APPEAL BOND—Collateral Attack.—In an action on an appeal bond, defendant cannot question its validity on the ground that the principal obligor failed to comply with all the legal provisions in perfecting the appeal, and it is sufficient for plaintiff to show that there was an appeal from a judgment, that the bond was executed, and that the judgment was affirmed on appeal.—PIERCE v. BANTA, Ind., 31 N. E. Rep. 812.

4. APPELLATE COURT—Jurisdiction.—Where the complaint in an action seeks to establish and foreclose a vendor's lien on land as well as to recover a personal judgment against one of the defendants, an appeal from such action lies to the supreme court rather than to the appellate court.—LACY v. ELLER, Ind., 31 N. E. Rep. 810.

5. ARBITRATION—Married Woman.—Though How. St. § 8474, which authorizes arbitration, excepts married women from its operation, where a married woman has no interest in the matters submitted other than as wife, the award may be binding on the husband, though the submission was signed by both.—TAYLOR v. SMITH, Mich., 52 N. W. Rep. 1118.

6. ATTORNEY—Disbarment.—It is misconduct by an attorney at law, and cause for disbaring him, that, in accounting to his client for money collected, he retained, without an express contract to justify it, 50 per cent. of the amount collected, and gave a false and deceitful account of the amount paid out by him for expenses, knowingly and willfully representing that amount to be at least three times as much as it was.—BAKER v. STATE, Ga., 15 S. E. Rep. 788.

7. ATTORNEY AND CLIENT — Authority to Appear.—Where an attorney waives process and appears for a defendant his authority to do so will be presumed; but the defendant may deny and disprove such authority, in which case he will not be bound by the attorney's appearance.—KIRSCHBAUM v. SCOTT, Neb., 52 N. W. Rep. 1112.

8. BAIL—Constitutional Law.—Article 126 of the constitution so enlarges the powers of justices of the peace that they are empowered to bail or discharge persons accused of crimes and offenses in cases not capital, or necessarily punishable at hard labor.—STATE v. TOUPS, La., 11 South. Rep. 528.

9. BAIL—Judgment — Appeal.—The forfeiture of an appearance bond or recognizance or bond is a criminal proceeding, and the appeal from the judgment of forfeiture is not to be tested by the rule applicable to civil actions.—STATE v. TOUPS, La., 11 South. Rep. 524.

10. CARRIERS—Passengers—Negligence.—In an action for personal injuries resulting from the overturning of defendant's stage-coach, on which plaintiff was a passenger, there was no error in charging the jury that the proof by plaintiff that she was injured "cast on defendant the burden of proving that the injury was occasioned by inevitable casualty, or by some other cause which human care and foresight could not prevent."—BUSH v. BARNETT, Cal., 31 Pac. Rep. 2.

11. CHATTEL MORTGAGE.—An instrument executed in the Indian Territory conveyed a stock of goods to a trustee with right to immediate possession, but was conditioned to be void if the grantor, within 60 days, should pay the amounts due certain creditors named therein, otherwise the trustee was to sell the goods, and apply the proceeds to the payment of the grantor's debts, in the order named: Held that, under the law of the territory as adopted from Arkansas, the instrument was, in effect, a mortgage with a power of sale, and not an assigment for the benefit of creditors.—RAINWATER-BOOGHER HAT CO. v. MALCOLM, U. S. C. C. of App., 51 Fed. Rep. 734.

12. CONSTITUTIONAL LAW — Site.—"Soldiers' and Sailors' Monument, Cuyahoga county," act of the General Assembly, passed April 16, 1888 (85 Ohio Laws, 564), authorizing the selection of the southeast quarter of the public square in Cleveland as the site for its erection, held constitutional.—GLEASON v. CITY OF CLEVELAND, Ohio, 31 N. E. Rep. 802.

13. CONSTITUTIONAL LAW — Collateral Attack.—The constitutionality of an act, creating a criminal court for a county, cannot be collaterally attacked on appeal from its decisions, on the ground merely that the county has not a population of over 50,000 as required by article 6, § 31, of the constitution, but the constitutionality of the act in such case will be conclusively presumed.—STATE v. WATTS, Mo., 20 S. W. Rep 237.

14. CONSTITUTIONAL LAW — Due Process — Verdict.—Under an indictment for murder in the first degree, a verdict was returned of "guilty as charged." The prisoner was accordingly sentenced to death, but the State supreme court, considering the evidence insufficient to show murder in the first degree, reversed the judgment, and remanded the case, with directions to allow the verdict to stand, and enter a new judgment, adjudging the prisoner guilty of murder in the second degree, which was done: Held, that this second judgment was void, for it was the jury's province to determine the degree of the crime, and the prisoner's confinement thereunder was without due process of law, and in violation of the fourteenth amendment to the constitution of the United States.—IN RE FRIEDRICH, U. S. C. C. (Wash.), 51 Fed. Rep. 747.

15. CONTRACT—Abandonment.—In an action on a contract for boaring a well on plaintiff's land it appeared that he agreed to furnish the casing, fuel and board for defendant and his men "at his own expense," and pay a certain sum when the well was completed. Defendant agreed to continue boring the well, "barring bad weather or other unavoidable hindrances," till a certain depth was reached or impenetrable rock was encountered. When about half the agreed depth was reached, defendant's auger broke near the lower end, and became fastened in the well. Defendant claimed he could remove the broken piece, and, after striving unsuccessfully for three weeks, plaintiff refused to furnish further fuel and board, and defendant abandoned the work: Held, that plaintiff was not entitled to recover for the value of supplies furnished defendant to the date the work was abandoned, since by the contract he was not released from furnishing them while boring was prevented by "unavoidable hindrances."—BARRETT v. AUSTIN, Cal., 31 Pac. Rep. 3.

16. CONTRACT — Construction — Novation.—A certain firm were creditors of defendant, having supplied him with merchandise and money for operating a saw mill. Thereafter they made a contract with a third person, whereby the latter was to furnish the money and supplies to operate the mill in future, and receive and sell the product,—paying to the firm $20,000 at the beginning, and $2,500 monthly for a period of 30 months, unless defendant in the meantime should pay the sum due them. The contract contained a stipulation that payment of the sum due the firm should not be enforced during that time against defendant, with the proviso that the agreement should not prevent the firm from taking the necessary steps to preserve the "legal life" of their demand: Held, that the contract did not constitute a novation, and the firm retained their right to sue defendant at any time before the account became barred by limitation.—DEXTER, HORTON & CO. v. SAYWARD, U. S. C. C. (Wash.), 51 Fed. Rep. 729.

17. CONTRACTS—Interpretation.—It being proposed to purchase a certain site for a board of trade building in Chicago, subscriptions for that purpose were sought from the owners of neighboring property, on the theory that the value thereof would be largely increased by the erection of such a building. Defendants agreed to pay a certain sum in consideration of the proposal to sell the site, and of the probable increase in value of the neighboring estates, "and the further consideration that the said board of trade shall erect and complete said proposed building and occupy the same for its regular sessions within two years from January 1, 1881:" Held, that the latter condition went to the whole promise, and on a breach thereof no suit could be maintained on the contract.—CINCINNATI, S. & C. R. CO. v. BENSLEY, U. S. C. C. of App., 51 Fed. Rep. 738.

18. CONTRACT—Quantum Meruit.—Defendant's intestate agreed, if plaintiff would take care of him and his house and property, to convey to her his farm at the end of a year. Plaintiff performed her part of the contract, but deceased died before the end of the year without having made the conveyance: Held, that plaintiff could recover on a *quantum meruit* for services rendered in pursuance of the contract.—SMITH v. LOTTON, Ind., 31 N. E. Rep. 816.

19. COUNTY AUDITOR — Powers.—The auditor, as *ex officio* clerk of the board of county commissioners, has no authority to bind the board by a contract for the publication of the annual statement of its receipts and expenditures.—BROWN v. BOARD OF COM'RS. OF BARTHOLOMEW COUNTY, Ind., 31 N. E. Rep. 811.

20. COURTS—Judge—Bill of Exceptions.—Rev. St. 1889, § 2171, provides that, where a judge who heard the case goes out of office before signing the bill of exceptions, it shall be signed by his successor in office. Section 3247 provides that no judge "who shall have been counsel in any suit or proceeding pending before him shall, without the express consent of the parties thereto, sit on the trial or determination thereof:" Held, that an attorney in a criminal case who succeeded to the judgeship after trial, and before the allowance of a bill of exceptions, is not competent to pass on such bill.—STATE v. WOFFORD, Mo., 20 S. W. Rep. 236.

21. CREDITORS' BILL — Remedy at Law. — Mill. & V. Code, §§ 5026-5038, declaring that a creditor, whose execution has been returned unsatisfied, or whose demand is unenforceable at law, and who is therefore unable to obtain judgment, may have a remedy in equity, or that a creditor without judgment may have such remedy to set aside fraudulent conveyances, do not extend to one holding a legal demand, but without judgment, so as to allow him to reach and subject to the satisfaction of his demand an equitable interest, not leviable at law, in the absence of any trust or fraud, and merely upon the ground that nothing could be made out of the debtor at law, on account of insolvency, or upon the ground that complainant had been obliged, as surety, to pay a debt for him, or had obtained an injunction restraining his collection or assignment of the said equitable interest.—MCKELDIN v. GOULDY, Tenn., 20 S. W. Rep. 231.

22. CRIMINAL EVIDENCE—Evidence on Former Trial.—Where a witness merely fails to prove what is expected, evidence that he proved it on a former trial is not admissible.— WALKUP v. COMMONWEALTH, Ky., 20 S. W. Rep. 221.

23. CRIMINAL EVIDENCE — Character. — Where, in a criminal case, defendant requests the court to instruct the jury that, "if a man's neighbors generally say he is untruthful, that makes his reputation for truth bad; but if, on the other hand, a man's neighbors generally say nothing about his truthfulness, that fact of itself is evidence that his general reputation for truth is good,"—it is not error for the court to so modify the last clause as to make it read, "That fact of itself may be evidence that his general reputation for truth is good; whether it is or not is a question solely for the jury."—CONRAD v. STATE, Ind., 31 N. E. Rep. 805.

24. CRIMINAL EVIDENCE—Murder.—On a trial for murder, evidence that a week before the homicide the accused and decedent quarreled, is competent to show malice, and that the accused had a motive for killing her —THOMAS v. COMMONWEALTH, Ky., 20 S. W. Rep. 226.

25. CRIMINAL LAW — Absence of Defendant.— Where, during a trial for murder, defendant was at the times sick, causing occasional absences from court room, but neither defendant nor his counsel moved to suspend trial therefor, and it does not appear that any of defendant's substantial rights were prejudiced by such occasional sickness and absence, the judgment of the court below will not be disturbed.—HITE v. COMMONWEALTH, Ky., 20 S. W. Rep. 217.

26. CRIMINAL LAW—Appearance of Accused.—In cases of felony it is essential that the record should show the accused was personally present during the trial, as well as when the sentence of law is passed upon him; but this fact will sufficiently appear if the record affirmatively shows, either expressly, or by reasonable intendment, or in substance, that he was present during the trial. —PALMQUIST v. STATE, Fla., 11 South. Rep. 521.

27. CRIMINAL LAW—Arson.— Where a person sets fire to a school house with the intention of burning an adjoining dwelling, which is in fact burned thereby, he is guilty of burning the dwelling.—COMBS v. COMMONWEALTH, Ky., 20 S. W. Rep. 221.

28. CRIMINAL LAW—Confession— Corroboration.— On a trial for poisoning cattle, a detective testified for the prosecution that defendant confessed to him that he had poisoned the cattle with Paris green, and it appeared that in consummation of a plan of revenge, suggested by defendant, for the alleged ill treatment of the detective by complainant, he purchased more of the poison, and went at night with the detective, and placed it in reach of complainant's cattle. Defendant denied that he confessed having poisoned the cattle prior to that time: Held, that the mode of revenge suggested by defendant, and the kind of poison to be used, were corroborative evidence of the truth of the confession.—OSBORN v. COMMONWEALTH, Ky., 20 S. W. Rep. 223.

29. CRIMINAL LAW—Homicide—Intoxication.—It is no defense to a prosecution for murder that defendant, who was orderly and entirely rational when sober, was intoxicated when he killed deceased.—MCCARTHY v. COMMONWEALTH, Ky., 20 S. W. Rep. 229.

30. CRIMINAL LAW—Instructions— Reasonable Doubt. —An instruction that a reasonable doubt must be a substantial doubt, based upon the evidence or lack of evidence on the whole case, and not a mere possibility of innocence, is unobjectionable, aside from its verbosity, and as favorable as any one would have a right to ask. —STATE v. WELLS, Mo., 20 S. W. Rep. 232.

31. CRIMINAL LAW— Larceny.—On a trial for larceny, an instruction that if the jury believed that the "meat" found in defendant's possession was part of the "heifer alleged to have been stolen," and that such

possession was unexplained, they could find him guilty, is error, since it either assumes that the heifer was stolen, or authorizes a presumption of guilt from the possession of property which is simply "alleged" to have been stolen.—STATE v. TAYLOR, Mo., 20 S. W. Rep. 239.

32. CRIMINAL LAW—Record on Appeal. — When the record on appeal in a criminal case does not show that an appeal was taken, the appeal will be dismissed.—STATE v. PROCTOR, Iowa, 52 N. W. Rep. 1127.

33. CRIMINAL PRACTICE—Defendant, in a prosecution for a felony, may plead "not guilty" and demur at the same time, and if the demurrer is overuled the trial proceeds on the plea as if the demurrer had not been filed.—STATE v. MCCOY, Mo., 20 S. W. Rep. 240.

34. CRIMINAL PRACTICE—Continuance.—The fact that attorneys engaged in a criminal case are so busy with other cases pending that they are unable to make any preparation in case in question, is not sufficient ground for granting a continuance.—SMITH v. STATE, Ind., 31 N. E. Rep. 807.

35. CRIMINAL PRACTICE— Information.— In an information of an offense prescribed and defined by statute, it is necessary to allege therein all the facts and circumstances which constitute the offense, or the party informed against will not be brought within the provision of the statute. — HAMILTON v. STATE, Fla., 11 South. Rep. 523.

36 DEPOSITIONS—New Trial.—A party whose witness has been examined by commission, and his testimony reported inaccuratly by the commissioners, should, if the mistake be known to the party or his counsel, have the commission re-executed before announcing ready for trial, and, when necessary, should apply for a continuance to afford time and opportunity for so doing. If the mistake were unknown until after trial, this fact must appear in order to render the mistake a legal and sufficient ground for granting a new trial. Due diligence in preparing for trial would ordinarily lead to the discovery of any material mistake of this sort in time to apply for a continuance.—GEORGIA RAILROAD & BANKING CO. v. CLARKE, Ga., 15 S. E. Rep 786.

37. DEED—Rescission.—The complaint, in an action to set aside a deed, alleged that the deed in question was made by plaintiff to defendant in view of death and to take the place of a will; that it was placed in defendant's hands only to enable her to prove the same after plaintiff's death; that it was understood that the deed was not to take effect until after plaintiff's death; that, after acknowledging the deed, plaintiff retained possession of it, and it was understood that he should retain possession of it until his death; that defendant thereafter wrongfully obtained possession of the deed, and had the same recorded: Held, that the facts stated were sufficient to entitle plaintiff to a trial as to the delivery of the deed.—DENIS v. VELATI, Cal., 31 Rep. 1.

38. EASEMENT—Right of Way.—The closing of a gat by one who is entitled to a pass-way over another's land, and the opening of a way several hundred yards to one side, is not an abandonment of the way as originally laid, although the change may not be insisted on without the owner's consent.—FAULKNER v. DUFF, Ky., 20 S. W. Rep. 227.

39. EMINENT DOMAIN—Construction of Railroad.— A railroad corporation organized under the general railroad law cannot lawfully enter upon any land in which there are successive estates, for the purpose of constructing its road thereon, without the consent of the owners, until it has first made compensation to the owners of both the present and future estates therein. —PRATT v. ROSELAND RY. CO., N. J., 24 Atl. Rep. 1027.

40. EMINENT DOMAIN—Damages.—In an action against a railroad company for appropriating land for a right of way, proof that plaintiff's husband had been paid for the land by a company under which defendant claimed by mesne conveyances, and that he was the authorized agent of plaintiff, should have been admitted. —RAGAN v. KANSAS CITY & S. E. R. CO., Mo., 20 S. W. Rep. 234.

41. EQUITY—Ancillary Jurisdiction—Fraud.—In a suit pending in the United States Circuit Court a compromise was effected, in pursuance of which defendant paid plaintiff a certain sum, and a final decree was entered by stipulation dismissing plaintiff's bill. Defendant subsequently executed a trust deed of all his property to N and S for the use and benefit of his heirs, and thereafter died; after which plaintiff filed a bill in the same court against N and S, to have the stipulation and decree of dismissal set aside for fraud: Held that, it being alleged in the bill that all the parties to the suit were citizens of the State, the court had no jurisdiction, as defendants not having been parties to the former suit, and not being the personal rep resentatives of the former defendant, and the prop erty which was the subject of the former contest not being any longer subject to the order of the court, the bill was an original one, not dependent upon or ancillary to the original suit, and a State court of equity could give full relief.—RALSTON v. SHARON, U. S. C. C. (Cal), 51 Fed. Rep. 702.

42. EQUITY—Pleading.—In deciding whether the matters objected to are pertinent or not, all substantial doubts as to whether they are pertinent or not are to be resolved in favor of their pertinency; and nothing should be expunged from the answer which the defendant has the right to prove, and which, if proved, can have any influence on the judgment of the court, either in deciding whether the complainant is entitled to any relief whatever, or the nature, character, or extent of the relief to which he may be entitled, even down to the question whether he shall have relief with or without costs.—LESLIE v. LESLIE, N. J., 24 Atl. Rep. 1029.

43. FORCIBLE ENTRY AND DETAINER—Complaint.—A description of a tract of land in a complaint in an action of forcible entry and detainer, before a justice of the peace of Holt county, as the "N. W. 1-4, section 20, township 29, range 14 west," is not void for uncertainty, although neither the meridian, county nor State is given. There is but one tract of land in this State to which such description is applicable, and that is situated in the county where the action was originally brought.—DEVINE v. BURLESON, Neb., 52 N. W. Rep. 1112.

44. HUSBAND AND WIFE—Antenuptial Contract.—By an antenuptial agreement, in consideration of $5 and love and affection, a wife released all claim which she "as widow might have in her husband's estate, whether in right of dower, or as her distributive share in the personalty, or otherwise, under the laws of the State." Of the same date of such agreement the husband made a writing in which he stated that he "intended to provide for her [his wife's] future consistent with his ability in a financial way." Afterwards the husband conveyed to his wife a life estate in his homestead, but made no provision for her support, and his will made no provision for her: Held, that the widow was entitled to her distributive share of the personal property.—IN RE PULLING'S ESTATE, Mich., 52 N. W. Rep. 1116.

45. INFANT—Contract with Father.—One F W, father of E A W, assisted in paying and securing certain debts of his son, and received a bill of sale from the son of certain personal property, which he took possesion of. The proof clearly established the fact that the son, a year or more before the execution of the bill of sale had been injured and his mind affected, so as to incapacitate him to transact business, and that his father had knowledge of these facts. In an action of replevin by the son to recover the property, the contract, not being for necessaries, was held void.—WILKINS v. WILKINS, Neb., 52 N. W. Rep. 1109.

46. INSOLVENCY—Discharge.—Where defendant, after making his note to plaintiff, who indorsed it to a third person, was discharged in insolvent proceedings, the note having been proved against his estate by the indorsee, the fact that after the maturity of the note plaintiff was obliged to pay the indorsee the balance

due thereon, after deducting the dividend received from defendant's estate, does not make defendant liable to plaintiff for the amount thus paid.—COLUMBIA FALLS BRICK CO. V. GLIDDEN, Mass., 31 N. E. Rep. 801.

47. INSURANCE— Agent— Contract.—Plaintiff was appointed general agent of a life insurance company, to solicit insurance on the "natural premium plan," as distinguished from "the level premium plan." He was to receive as compensation a certain commission on all first and renewal premiums collected on policies issued under the contract. The company agreed, in case of a discontinuance of the agency for any cause except dishonesty, after plaintiff had secured a certain amount of insurance, in force, to collect the premiums possible, and pay to plaintiff a certain per cent. of the renewal commissions collected for a period of five years. The contract provided that the company could terminate the contract "upon the neglect or refusal of the agent to account for all moneys belonging to the company, or for dishonesty," or for non-compliance with certain rules and instructions. The company abandoned the "natural premium plan" without plaintiff's consent, and refused to allow him to solicit risks according to such plan: Held, that this action constituted a wrongful termination of the agency.—NEWCOMB V. IMPERIAL LIFE INS. CO., U. S. C. C. (Mo.), 51 Fed. Rep. 725

48. INSURANCE— Limitation— Construction. — A condition in an insurance policy that no suit can be maintained unless brought within 12 months "after the date of the fire," should be so construed as to give 12 full months during which the insured has a right to sue; and when, by another clause, the policy does not become payable until 60 days from the proofs of loss, suit may be brought within 12 months from the expiration of the 60 days.—STEEL V. PHENIX INS. CO. OF BROOKLYN, U. S. C. C. of App., 51 Fed. Rep. 715.

49. JUDGMENT—Filing Transcript.— Civil Code, § 723, allowing a transcript of a judgment from a justice or quarterly court to be filed in the circuit upon a return of "No property," and declaring the same remedies thereon as if the judgment had been rendered in that court, does not create a lien upon land in an action merely for goods sold and delivered, where the claim is for an amount less than the jurisdiction given to such court.—EASTERLING V. THOMAS, Ky., 20 S. W. Rep. 227.

50. JUSTICE OF THE PEACE—Judgment.—An entry in a justice's docket that an adjournment for more than three days, which, under Code, § 3527, he had no authority to make on his own motion, was made with the consent of plaintiff and defendant's agent is not conclusive, and a judgment by default entered after such adjournment is void when in fact no agent of defendant consented to the adjournment.—IOWA UNION TEL. CO. V. BOYLAN, Iowa, 52 N. W. Rep. 1122.

51. LANDLORD AND TENANT—Rent.— Where defendant takes a deed from a lessee subject to an annual rent to be paid plaintiff, and then attorns to her for several years, he cannot deny her title in an action for rent without setting up fraud or some other defense recognized by law.—DERRICK V. LUDDY, Vt., 24 Atl. Rep. 1050.

52. LIBEL—Evidence.—Where words alleged to be libelous import political treachery in plaintiff, and that he would commit perjury to defend himself against charges of such treachery, it is competent for defendant, when he pleads truth as justification, to show, not only the general reputation of plaintiff for truth and veracity, but also that he is generally regarded in the community as a person unworthy of belief in political matters.— SANFORD V. ROWLEY, Mich., 52 N. W. Rep. 1119.

53. LIFE INSURANCE—Application.—Where an application for life insurance has been made to an insurance solicitor, but the applicant dies before a policy is issued, and none in fact is ever issued, the presumption is that there was no contract of insurance, and no purpose to contract, otherwise than by a policy made and delivered upon simultaneous payment of the premium.— PAINE V. PACIFIC MUT. INS. CO., U. S. C. C. of App., 51 Fed. Rep. 689.

54. MALICIOUS PROSECUTION— Probable Cause.— Circumstances sufficient merely to warrant a "cautious" man in believing another guilty of an offense are not enough to save one from damages for malicious prosecution, but the belief must have been that also of a reasonable and "prudent" man. — MCCLAFFERTY V. PHILPS, Pa., 24 Atl. Rep. 1042.

55. MANDAMUS.—On *mandamus* to compel the comptroller to issue an order for relator's salary as executive secretary, where the application alleges relator's appointment to the office by B as governor of the State, allegations in the return to the writ that M received a majority of votes for governor, and that he did not appoint relator to the office of executive secretary, present an issue which is immaterial, as being between persons not parties to the record, and such allegations may properly be expunged. — BRAINARD V. STAUB, Conn., 24 Atl. Rep. 1040.

56. MECHANICS' LIEN— Equitable Relief.— An action was instituted to foreclose a mechanic's lien, and have certain policies of insurance taken in the name of the land-owner assigned to the plaintiff: Held, the action being instituted as one in equity, that the procedure in equity in regard to appeals to the supreme court applies, even if some of the proceedings were in the nature of an action at law.—STAR UNION LUMBER CO. V. FINNEY, Neb., 52 N. W. Rep. 1113.

57. MORTGAGES—Apportionment of Lien.—A mortgage covering three lots of land was given to secure the payment of a note of $700. The condition of defeasance was that the mortgagor should pay that sum, "said $700 to be a specific lien of $233.33 on each of the above-described lots, releasable at any time by the payment of said amount of $233.33, together with accrued interest." Held, that this was in effect a separate mortgage of $233.33 upon each lot separately; hence a notice of foreclosure sale, under the power, stating only the amount of the entire debt claimed to be due, as though the mortgage had been for the entire debt without apportionment, was invalid, and a sale of the three lots together for a gross sum was also invalid, and the foreclosure was ineffectual.—CHILD V. MORGAN, Minn., 52 N. W. Rep. 1127.

58. MORTGAGE—Parol Evidence. — After a bond and mortgage have become due, a promise to extend the time of payment may be shown by parol.—VAN SYCKLE V. O'HERAN, N. J., 24 Atl. Rep. 1024.

59. MORTGAGE— Payment.—Equity will not permit a mortgagor or his grantees, who are in default in the payment of interest due upon a mortgage, to pay both principal and interest, when by its terms the principal is not payable until the death of a third person, who is still living, but which provides that the interest shall be paid semi-annually, and, if not paid within 30 days after it becomes due, the principal shall also become due, without adding, "at the option of the owner or holder," or any equivalent words.—COX V. KILLE, N. J., 24 Atl. Rep. 1032.

60. MUNICIPAL CORPORATION—Public Improvements. —Where a board of city trustees adopts a resolution of intention to construct a sewer along a portion of a street, but lets a contract for constructing the sewer along only a part of the portion specified in the resolution, the contract is void, and an assessment under the same creates no lien on property benefited.—MCBEAN V. REDICK, Cal., 31 Pac. Rep. 7.

61. MUNICIPAL IMPROVEMENTS —Change of Grade.— Under Const. art. 16, § 8, which declares that "municipal and other corporations shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements," plaintiff, who has built a house on his lot in conformity with the existing physical grade of an old public highway in front of the lot, may recover from the city damage to the lot resulting from a change in the grade.—O'BRIEN V. CITY OF PHILADELPHIA, Pa., 24 Atl. Rep. 1047.

62. MUNICIPAL IMPROVEMENTS — Change of Grade.—Where a city changes the grade of the street, it is not liable to the abutting lot owner for the damages resulting therefrom to a house erected on the lot after the change in grade was authorized.—GROFF V. CITY OF PHIPADELPHIA, Pa., 24 Atl. Rep. 1048.

63. NEGLIGENCE—Proximate and Remote Cause.— A fair association permitted private teams to be driven around the race course after the races had been run. The driver of a team of young horses whipped them into running away, and they ran off the track, and injured a visitor at the fair: Held that, the injury being proximately caused by the driver's wrongful act, and not being a direct or natural consequence of the permission given owners of teams to use the track, the association was not liable.—BARTON V. PEPIN COUNTY AGRICULTURAL SOC., Wis., 52 N. W. Rep. 1129.

64. NEGOTIABLE INSTRUMENT— Consideration.—In an action on a note given for the purchase of a bond, the invalidity of such bond on account of non-compliance with statutory requirements in its issue does not constitute a failure of consideration.—HARVEY V. DALE, Cal., 31 Pac. Rep. 14.

65. NEGOTIABLE INSTRUMENT—Execution.—In an action on a note for money loaned, it appeared that the borrower, at the time of the loan and the exception and delivery of a note signed by himself alone, promised that another would sign as joint maker: Held, that the execution and delivery of the note was incomplete until the other had signed, and his subsequent signing bound him, without a new consideration.—WINDERS V. SPERRY, Cal., 31 Pac. Rep. 6.

66. PARTNERSHIP — Evidence.—Proof that two men owned a ranch and herd of cattle jointly, that they managed the ranch together, rendered accounts in their joint names, and referred to themselves as a company, is sufficient to show that they were copartners, although they had no articles or agreement of copartnership.—CLAFLIN V. BENNETT, U. S. C. C. (Ill.), 51 Fed. Rep. 698.

67. PARTNERSHIP—Schedules.—The articles of association, with accompanying schedules, required by the limited partnership act, should conform fully to all its provisions, and be self-explanatory and self-sustaining, and cannot be supplemented or amended by oral testimony.—GEARING V. CARROLL, Penn., 24 Atl. Rep. 1045.

68. PAYMENT—Note.—Taking a note for a debt does not operate as full payment, in the absence of an agreement to that effect.—PRICE V. BARNES, Ind., 31 N. E. Rep. 809.

69. PRACTICE—Costs on Change of Venue.—Rev. St. § 2941, provides that, in case of a change of venue, the expenses of the trial shall be taxed and allowed by the judge of the court where the trial took place, and that the bill shall be presented to the county board of supervisors of the proper county, which board "shall issue an order therefor" in favor of the county in which the action was tried: Held, that the county board had no jurisdiction to pass on a bill as taxed and allowed by the judge.—WAUSHARA COUNTY V. PORTAGE COUNTY, Wis., 52 N. W. Rep. 1135.

70. PRACTICE—Dismissal of Action—Appeal from Order for Change of Venue.—A judgment dismissing an action after a party had announced himself as determined to stand on his exceptions, which were to an order granting defendant a change of venue, and fixing an amount to be paid him, and after complainant had declined to file the papers in the court to which the change had been granted, even if irregular, is without prejudice, since a discontinuance would have followed in any event such an announcement and declination, under section 2589 of the Code of venue.—EDGERLY V. STEWART, Iowa, 52 N. W. Rep. 1121.

71. PRACTICE—Withdrawal of One Cause of Action.—An order permitting plaintiff to withdraw one of the items constituting the cause of action, being more in the nature of an order to amend than an order to discontinue, may be granted without costs to plaintiff, and without notice of motion to defendant.—LATIMER V. SULLIVAN, S. Car., 15 S. E. Rep. 798.

72. PUBLIC LAND — Patents — Cancellation.—A patent will not be canceled on the ground that it was procured by the fraud of the patentee, where the land has passed to a *bona fide* purchaser from the patentee, for value and without notice of the fraud, though such purchase was made before the patent was issued, and while the patentee had only an equitable title.—PEOPLE V. SWIFT, Cal., 31 Pac. Rep. 16.

73. TAXATION—Sewer Assessments.—Under Act March 18, 1885, § 10, providing that, when the owner of premises assessed for constructing a sewer "cannot conveniently be found," or is unknown, payment of such assessment shall be publicly demanded on the premises, the complaint, in an action to foreclose a lien of assessment, where payment was publicly demanded on the premises, and the owner thereof is known, must allege that the owner could not "conveniently be found."—MCBEAN V. MARTIN, Cal., 31 Pac. Rep. 5.

74. TELEGRAPH COMPANIES — Damages.—Plaintiff deposited money with defendant telegraph company, to be transmitted to a bank for the payment of plaintiff's note due on that day, but because of defendant's failure to notify the bank until the day following the note went to protest: Held that, in the absence of pecuniary loss resulting from defendant's failure, plaintiff cannot recover damages to his credit.—SMITH V. WESTERN UNION TEL. CO., Penn., 24 Atl. Rep. 1050.

75. TENANT IN COMMON — Parol Agreement.—Where one of several tenants in common of land purchases the same at a master's sale thereof, in partition, upon a parol agreement with his cotenants to hold the same in trust for them, and uses there releases to the master for their share in the proceeds in payment of the purchase money, without actually paying any money, a trust results in favor of the cotenants.—FAY V. FAY, N. J., 24 Atl. Rep. 1036.

76. WILLS—Admission to Probate.—Where a caveat against the admission to probate of a paper purporting to be the will of F D, deceased, was filed, by a person interested in his estate, with the surrogate of the county in which F D resided at his death, and afterwards application was made to that surrogate to admit such a paper, caveated against, to probate, and before the surrogate had issued citations for the appearance of the parties interested in the orphans' court, and before that court had taken action in the matter, the application was withdrawn by writing delivered to the surrogate: Held, that the withdrawal was a sufficient discontinuance of the proceeding, and that the ordinary will assume jurisdiction, upon a subsequent application to him for probate of the same paper.—IN RE FISHER'S WILL, N. J., 24 Atl. Rep. 1019.

77. WILLS—Life Estate.—A will directed that a portion of testator's land, then occupied by the widow and children of his deceased son, should remain in the family of the son during their natural lives, "provided they live and remain on the same," but there was no devise over: Held, that the devisees took a life estate, and that they did not forfeit it by procuring a partition sale of the land.—HOWELL V. PATRY, N. J., 24 Atl. Rep. 1037.

78. WITNESS—Transactions with Decedent.—Act May 23, 1887.—P. L. p. 158, § 5, (E),—provides that, where any party to a thing or contract in actions is dead, and his right has passed to a party on record who represents his interest, the surviving or remaining party to such thing or contract, or any other person whose interest is adverse to the right of deceased, shall not be a competent witness to any matter occurring before his death: Held, where an execution purchaser sought to show that a former sale of the property, through which defendants claimed title, was made in fraud of creditors, that the original owners had no "adverse interest" which prevented them from testifying to transactions with the first purchaser prior to his death.—DICKSON V. MCGRAW, Penn., 24 Atl. Rep. 1043.